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Washington, D.C. 20463

JUN 29 2009

CELA

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 6122

DATE COMPLAINT FILED: January 22, 2009¹

DATE OF NOTIFICATION: January 23, 2009

LAST RESPONSE RECEIVED: February 6, 2009

DATE ACTIVATED: March 31, 2009

EXPIRATION OF SOL: October 28, 2013 earliest/
October 28, 2013 latest

COMPLAINANT:

Aaruni Thakur

RESPONDENTS:

National Association of Home Builders

Gary Miller for Congress and Cathleen Miller,
in her official capacity as Treasurer

RELEVANT STATUTES:

2 U.S.C. § 434(b)

2 U.S.C. § 441a(a)

2 U.S.C. § 441b

11 C.F.R. § 100.22

11 C.F.R. § 109.21

11 C.F.R. § 114.2

11 C.F.R. § 114.3

11 C.F.R. § 114.15

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

¹ The original complaint was filed on October 30, 2008, but was unsworn and did not clearly identify the complainant. Respondents were notified of this deficient complaint on November 6, 2008. After complainants were advised of the procedural deficiencies, a properly sworn complaint was resubmitted on January 22, 2009.

I. INTRODUCTION

This matter involves allegations that the National Association of Home Builders ("NAHB") made a prohibited corporate expenditure, a prohibited PAC solicitation outside its restricted class, and/or a prohibited in-kind contribution to Gary Miller for Congress (the "Miller Campaign") in connection with a mailer it sent to homes in Congressman Miller's district a week prior to the 2008 general election. NAHB denies that the mailer was a PAC or campaign solicitation and denies that it contained the express advocacy required to constitute a corporate expenditure. Both NAHB and the Miller Campaign deny that the mailer was coordinated with the Miller Campaign in a manner that would result in an in-kind contribution.

Based on a thorough review of the Complaint, the Responses, and other available information, there appear to be no basis for finding that the NAHB mailer is a corporate expenditure or an in-kind corporate contribution. First, the NAHB mailer is not a solicitation as defined by the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). Second, the mailer does not qualify as a corporate expenditure because it does not contain express advocacy under the standards set forth in 11 C.F.R. § 100.22(a) & (b). Finally, there is no indication that the mailer qualifies as a coordinated communication as defined in the Act, since the mailer does not meet the third prong of the three-prong coordination test. See 11 C.F.R. § 109.21.

Accordingly, we recommend the Commission find no reason to believe that the National Association of Homebuilders made a prohibited corporate expenditure or a corporate in-kind contribution, or that Gary Miller for Congress and Cathleen Miller, in her official capacity as Treasurer, received a prohibited in-kind contribution in violation of 2 U.S.C. § 441b(a).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

NAIIB, an incorporated building industry trade association whose stated mission is to "promote policies that will keep housing a national priority," sent a mailer to homes in Congressman Miller's district a week prior to the 2008 election praising his voting record on certain issues and suggesting that readers "thank" Congressman Miller for "fighting for working families in Southern California." Complaint, Attachment 1. The mailer contained the following statements:

- Protecting the American Dream.
 - Gary voted to create a \$7,500 temporary first-time home buyer tax credit.
 - Voted for legislation to make more mortgage bonds available.
 - He voted for legislation to help victims of the sub-prime crisis.
- Energy Independence Is No Longer Just A (sic) Economic Issue, But Also A National Security Issue.
 - Gary supports increased development of clean coal, natural gas, and oil.
 - Supports increasing domestic exploration in Alaska and off our coast.
 - Congressman Miller supports incentives to encourage further development and use of alternative fuels.

See Complaint, Attachment 1.

Attached to the Complaint is a letter written by Ms. Jenny Hall, addressed "To Whom It May Concern," and stating that she and her husband had received the NAHB mailer on October 28, 2008 and were "not members of, nor contributors to, the National Association of Homebuilders, or the National Association of Homebuilders' Political Action Committee (PAC)." *Id.*

1 NAHB admits that it sent the mailer to the Halls, but rejects all allegations of
2 impropriety. First, NAHB denies that the mailer was a solicitation as asserted in the Complaint,
3 arguing that the mailer did not solicit funds from the recipient or provide information as to how
4 the recipient might make a contribution. *Id.* Second, NAHB denies the inference raised by the
5 Complaint, that the mailer constituted a corporate expenditure, because the communication was
6 not express advocacy, and states that it is merely an exercise of NAHB's right to publicly discuss
7 issues relevant to the home building industry. *Id.* at 2-3. Finally, NAHB avers that the mailer is
8 not "campaign literature" and therefore not a coordinated communication, as implied by the
9 Complaint, because it does not meet the three-prong coordination test set forth in the
10 Commission's regulations. *Id.*

11 NAHB submits an affidavit from its Staff Vice President of Government Affairs, Stephen
12 T. Gallagher, who attests to the circumstances surrounding the creation, production and
13 distribution of the mailer. Affidavit of Stephen T. Gallagher ("Gallagher Aff.") at ¶ 1. Gallagher
14 declares that the intended audience for the mailer, means of communication, media used, and
15 timing of the mailer were decisions made solely by NAHB, and neither Congressman Miller, his
16 agents, campaign, nor any political party had any role in the creation, production or content of
17 the mailer. *Id.* at ¶¶ 5-6. Gallagher attests that the mailer did not use any candidate's campaign
18 materials and was not created, produced, or distributed at the suggestion or request of any
19 candidate, authorized committee, or political party committee. *Id.* He also states that the mailer
20 was created without the use of any common vendors for its creation or distribution, and without
21 any agreements (formal or informal), or discussion (substantial or insubstantial) between NAHB
22 and Congressman Miller, his agents or authorized committee, or with any other candidate, their
23 agents, authorized committee, or party committee. *Id.* at 7.

Attached to Gallagher's affidavit was a copy of an NAHB Issue Communications Pledge ("Issue Pledge"), which was provided to and signed by all NAHB employees working on the mailer. NAHB Response, Exh. B. The Issue Pledge states that NAHB adopted guidelines for the conduct of any issue communications, which include:

- No discussion by any NAHB employees or officers regarding issue communications will be made with any candidate.
- No candidate will be made aware of any NAHB issue communication plans.
- NAHB employees are specifically informed that any transmittal of any issue communication plan to any candidate or political committee may be the grounds for dismissal from NAHB employment.
- No NAHB official, member or employee who is involved in a federal candidate's campaign...may participate in any discussion of or planning for any issue communications in which that candidate or his or her opponent is to be identified.
- NAHB will not use for its issue communications any vendor that has worked with the campaign of an identifiable candidate in such communications.
- I also pledge to recuse myself from any discussion of any NAHB issue advertising that includes any federal candidate in whose campaign I am involved. I pledge to inform NAHB of my involvement. If I am present at a meeting in which such a discussion is contemplated, I will remove myself from that meeting and refuse to take part in any decision making on such possible activities.

NAHB contends that the Gallagher Affidavit and Issue Pledge provide sufficient support for its assertions that the mailer at issue was not a solicitation, coordinated communication, or corporate contribution that violated the FECA and it asks that the Complaint be dismissed.

The Miller Campaign also submitted a response denying the allegations in the Complaint. Specifically, the Miller Response clarified that the mailer, which was referred to in the Complaint as a "campaign brochure," was actually produced and distributed by NAHB and not the Miller Campaign. Miller Response at 1. The Miller Campaign denies any knowledge or participation in the creation, production, or distribution of the mailer at issue, and states that

1 neither the Miller Campaign nor the candidate had any prior knowledge that the mailer was
2 being produced or distributed. *Id.*

3 **B. Analysis**

4 The Act prohibits corporations, such as NAHB, from making contributions or
5 expenditures in connection with any election for Federal office. 2 U.S.C. § 441b(a). The Act
6 and implementing regulations also prohibit corporate officials from facilitating the making of
7 contributions by ordering or directing subordinates or support staff to plan, organize, or carry out
8 a fundraising project as part of their work responsibilities using corporate resources, unless the
9 corporation receives advance payment for the fair market value of such services. 2 U.S.C.
10 § 441b(b); 11 C.F.R. § 114.2(f)(2).

11 **1. NAHB "Solicitation"**

12 The Complaint alleges that the NAHB mailer violated the FECA by soliciting
13 contributions on Congressman Miller's behalf from individuals outside of NAHB's "restricted
14 class." Complaint at 1. A corporation and its officers may make partisan communications to its
15 restricted class of stockholders and executive or administrative personnel and their families, as
16 an exception to the Act's general prohibition against corporate facilitation of contributions. *See*
17 11 C.F.R. § 114.3. 2 U.S.C. § 441b(b)(2)(A). As long as these communications are aimed at
18 this "restricted class," and the corporation does not otherwise use corporate resources to facilitate
19 the contributions by means such as coercing employees to contribute, or by collecting and
20 forwarding the contributions, such communications are not a violation of the FECA. *See*
21 11 C.F.R. § 114.2(f)(1).

22 While the Complaint alleges the mailer sent by NAHB, was "an impermissible
23 solicitation" that was "conducted outside their restricted class," the mailer does not ask for

1 contributions nor does it provide any mechanism or means by which the recipient could make a
2 contribution. See NAHB Response at 2. There is no telephone number, street address or
3 campaign website provided that a recipient could use to make a contribution.²

4 Based on the available information, we recommend the Commission find no reason to
5 believe that the National Association of Homebuilders Association impermissibly solicited
6 individuals outside its restricted class in violation of 2 U.S.C. § 441b(b)(2).

7 2. Express Advocacy

8 The Complaint asserts that the mailer is "campaign literature" and/or a "campaign
9 brochure" and implies that it expressly advocates the election of Congressman Miller, which
10 would make it a corporate expenditure prohibited by the FECA. Complaint at 1. The NAHB
11 response specifically denies that the mailer contains express advocacy and is therefore a
12 prohibited corporate expenditure. The mailer clearly does not contain express advocacy under
13 Section 100.22(a) of the Commission's regulations. On balance, we also have concluded that the
14 mailer does not contain express advocacy under Section 100.22(b).

15 Commission regulations found at 11 C.F.R. § 100.22(a) provide that a communication
16 expressly advocates the election or defeat of a clearly identified candidate when it uses phrases
17 such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses
18 campaign slogans or individual words, "which in context can have no other reasonable meaning
19 than to urge the election or defeat of one or more clearly identified candidate(s)...." 11 C.F.R.
20 § 100.22(a); see also *Buckley v. Valeo*, 424 U.S. 1, at 44 n.52 (1976) ("*Buckley*"); *FEC v.*
21 *Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*")(urging readers to vote for
22 "pro-life" candidates, and providing information indicating a view as to which specific

² The mailer includes Miller's Congressional website address (www.garymiller.house.gov), which does not allow for the receipt of candidate contributions

1 candidates met this description.). The NAHB mailer does not on its face meet the first test for
2 express advocacy, as the mailer does not include phrases such as "vote for," "cast your ballot,"
3 "elect," "defeat," "support," or other slogans or individual words which in context could have no
4 other reasonable meaning than to urge the election or defeat of Congressman Miller.

5 Commission regulations found at 11 C.F.R. § 100.22(b) provide that a communication
6 contains express advocacy when the communication taken as a whole or with limited reference
7 to external events, "could only be interpreted by a reasonable person as containing advocacy of
8 the election or defeat of one or more clearly identified candidate(s) because" it contains an
9 "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning"
10 and "reasonable minds could not differ as to whether it encourages actions to elect or defeat one
11 or more clearly identified candidate(s) or encourages some other kind of action." See 11 C.F.R.
12 § 100.22(b). The Commission has noted that "communications discussing or commenting on a
13 candidate's character, qualifications or accomplishments are considered express advocacy under
14 new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage
15 actions to elect or defeat the candidate in question." See Express Advocacy; Independent
16 Expenditures; Corporate and Labor Organization Expenditures: Explanation and Justification, 60
17 Fed. Reg. 35292, 35295 (July 6, 1995).³

³ In *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL*."), the Supreme Court held that "an ad is the functional equivalent of express advocacy," and can constitutionally be regulated as an electioneering communication under 2 U.S.C. § 441b(b)(2), if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Although 11 C.F.R. § 100.22 was not at issue in the matter, the Court examined whether the ad had "indicia of express advocacy" such as the "mention [of] an election, candidacy, political party, or challenger" or whether it "take[s] a position on a candidate's character, qualifications, or fitness for office." *Id.* The Commission subsequently incorporated the principles set forth in the *WRTL* opinion into its regulations governing permissible uses of corporate and labor organization funds for electioneering communications at 11 C.F.R. § 114.15. See Final Rule on Electioneering Communications, 72 Fed. Reg. 72899, 72914 (Dec. 26, 2007).

1 On balance, we conclude that the mailer does not contain an "electoral portion" that is
2 "unmistakable, unambiguous, and suggestive of only one meaning" upon which reasonable
3 minds could differ as to whether it encourages electoral or some other action. See 11 C.F.R. §
4 100.22(h). While the mailer clearly describes Miller favorably, e.g., "Gary Miller is fighting for
5 working families," and asks recipients to "Thank" Miller for positions and votes he had taken in
6 the past (e.g., voting to create a \$7,500 temporary first-time home buyer tax credit, voting to
7 make more mortgage bonds available and for legislation to help victims of the subprime crisis), it
8 does not explicitly praise Miller's personal characteristics, such as his "leadership" or
9 "experience," which the Commission has found may sometimes be indicia of express advocacy.
10 See e.g., MURs 5577/5620 (Nat'l Assoc. of Realtors).

11 While the mailer was sent immediately prior to the general election, the focus of the
12 communication is on issues and Miller's positions on those issues. Given the lack of any clear
13 directive other than to "Thank" Miller for his positions, and taking the communication as a
14 whole, one can reasonably view the mailer as praising Miller's positions and encouraging him to
15 maintain those positions in the future, and not as encouraging the reader to vote for or against
16 Miller in the upcoming election. See MUR 5854 (Lantern Project)(advertisements criticizing
17 Senator's votes on particular issues were not express advocacy because they could reasonably be
18 viewed as expressing the sponsoring organization's view on that issue);⁴ See also, MUR
19 5779/5805 (City of Santa Clarita)(banners thanking a U.S. Representative for a specific piece of
20 legislation did not expressly advocate his election because they could be reasonably interpreted
21 as advocating passage of the legislation and thanking the legislator for sponsoring it).

⁴ Compare, Final Rule on Electioneering Communications: Explanation and Justification, 72 Fed. Reg. 72899, 72908 (Dec. 26, 2007). In revising its electioneering communications to conform to the Supreme Court's opinion in *WRIL*, the Commission concluded that an advertisement's focus on a single issue could support a determination that the advertisement was subject to an interpretation other than as an appeal to vote against the candidate, and was therefore a permissible electioneering communication under the general exemption in 11 C.F.R. § 114.15(a).

1 Taking the communication as a whole, it is not clear that reasonable minds could have
2 only concluded that the mailer encouraged action to elect Miller instead of some other kind of
3 action. We therefore conclude that the mailer does not qualify as express advocacy, as set forth
4 in 11 C.F.R. § 100.22(b), and is not an expenditure, as defined by 2 U.S.C. § 431(9)(A)(i).
5 Accordingly, we recommend the Commission find no reason to believe that National Association
6 of Homebuilders violated 2 U.S.C. § 441b(a) by making a corporate expenditure..

7 **3. Coordination Allegations**

8 The Complaint infers that the NAHB mailer was sent to support the Miller Campaign
9 when it asserts that the NAHB mailer was "campaign literature" or a "campaign brochure."
10 NAHB and the Miller Campaign both responded to this assertion by denying that NAHB's
11 mailer had been coordinated with the Miller Campaign. *See* NAHB and Miller Responses.

12 The FECA provides that a payment for a communication that is made by any person "in
13 cooperation, consultation, or concert, with or at the request or suggestion of" a candidate
14 constitutes an in-kind contribution to that candidate. *See* 2 U.S.C. § 441a(a)(7)(B)(i), 11 C.F.R.
15 § 109.21(b)(1). If the mailer were the results of a coordinated communication between NAHB
16 and the Miller Campaign, it would be an in-kind contribution prohibited by 2 U.S.C. § 441b.

17 The Commission's regulations provide a three-prong test to determine whether a
18 communication is coordinated.⁵ All three prongs of the test must be satisfied to support a

⁵ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. FEC*, 508 F. Supp. 2d 10, 70-71 (D.D.C. Sept. 12, 2007) (granting in part and denying part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, inter alia, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

1 conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also*
2 Explanation and Justification for Regulations on Coordinated and Independent Expenditures,
3 68 Fed. Reg. 772 (Jan. 3, 2003).

4 The first prong of the Act's three-prong coordination test provides that the
5 communication must be paid for by a person other than the Federal candidate, the candidate's
6 authorized committee, or political party committee, or any agent of the foregoing. *See* 11 C.F.R.
7 § 109.21(a)(1). Here, the first prong of the coordination test is met because NAHB admits that it
8 paid for the direct mail communication at issue. NAHB Response at 2.

9 The second prong of the coordination test requires that a communication must satisfy one
10 of the "content" standards in 11 C.F.R. § 109.21(c), which include, among other things, a public
11 communication that refers to a clearly identified House or Senate candidate and is publicly
12 distributed in the clearly identified candidate's jurisdiction 90 days or fewer before the
13 candidate's general, special or runoff election. 11 C.F.R. § 109.21(c)(4)(i). The NAHB direct
14 mail communication clearly identifies a House candidate, Gary Miller, and was distributed in the
15 candidate's jurisdiction approximately seven days prior to the general election. Thus, the NAHB
16 mailer also meets the second or "content" prong of the coordination test.

17 The third prong of the coordination test requires that the parties have engaged in conduct
18 that meets any of the six following standards: (1) the communication is created, produced, or
19 distributed at the request, suggestion, or assent of a candidate, his authorized committee, a
20 political party or an agent of any of the foregoing; (2) the candidate or authorized committee is
21 materially involved in decisions regarding the content, intended audience, means, or mode of
22 communication; (3) there is substantial discussion about the communication between the person

frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

1 paying for the communication and the candidate, authorized committee, political party, or agent
2 of the campaign; (4) the person paying for the communication and the campaign share certain
3 types of common vendors who use or convey information about the candidate's plans, projects,
4 activities, or needs in the creation, production or dissemination of the communication; (5) the
5 communication is paid for by a person or by the employer of a person who was an employee or
6 independent contractor of the candidate; and (6) the dissemination, distribution, or republication
7 of the campaign materials occurs under circumstances that reflect agreement or formal
8 collaboration between the candidate or his committee and other party. 11 C.F.R. § 109.21(d)(1)-
9 (6).

10 The mailer does not meet the "conduct" prong of the coordination test. As discussed
11 below, each element of the conduct prong is specifically addressed and rebutted by NAHB and
12 the Gallagher Affidavit. Because the NAHB mailer fails to meet the conduct prong, there was no
13 coordination that would result in an impermissible in-kind contribution. See 11 C.F.R. § 109.21.

14 The affidavit of NAHB Staff Vice President of Government Affairs Stephen T. Gallagher
15 establishes that the NAIIB mailer was created and produced solely at the direction of NAHB and
16 its employees, without any involvement from Congressman Miller or any other candidate, their
17 agents, or employees. Gallagher Aff. at ¶¶ 5-6; see also Miller Response at 1. The Miller
18 Campaign reiterates that neither the candidate, the Committee, nor its agents had any knowledge
19 that NAHB was producing or distributing the mailer. See Miller Response at 1. Gallagher also
20 declares that no common vendors were used in the creation and/or distribution of the mailer and
21 that there was no formal or informal agreement between NAIIB and Congressman Miller, and
22 their agents, or discussion, substantial or otherwise, regarding this mailer between NAHB and

any candidate, authorized committee, or party committee or their agents, prior to the production and distribution of the mailer. *Id.* at ¶ 7.

The Issue Pledge that Gallagher and all NAHB employees working on the mailer were required to sign explicitly provides that NAHB employees and officers are to have no discussions with any candidate, campaign, or party official regarding its issue communications or publications discussing any issue communication plans; no candidates or committees are to be made aware of any NAHB issue communication plans; and transmittal of issue communication plans to a candidate or political committee by NAHB employees is grounds for dismissal. NAHB Response, Exh. B. The Issue Pledge also states that NAHB will not use any vendor for its issue communications that has worked with the campaign of a candidate unidentified in its communications. *Id.* The Issue Pledge also requires the employee to recuse himself from any discussion of NAHB issue-advertising or decision-making activities that involve a federal candidate in whose campaign the employee was involved, and to inform NAHB of such involvement in any federal campaign. *Id.*

Based on the available information, we recommend the Commission find no reason to believe that the National Association of Homebuilders Association made a coordinated communication in violation of 2 U.S.C. § 441b. We further recommend that the Commission find no reason to believe that Gary Miller for Congress and Cathleen Miller, in her official capacity as Treasurer, violated 2 U.S.C. §§ 441b(a) and 434(b) by accepting and failing to report a prohibited in-kind contribution.

III. RECOMMENDATIONS

1. Find no reason to believe that the National Association of Homebuilders violated 2 U.S.C. § 441b(a) by making prohibited in-kind contributions;

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2. Find no reason to believe that Gary Miller for Congress and Cathleen Miller, in her official capacity as Treasurer, violated 2 U.S.C. §§ 441b(a) and 434(b) by accepting and failing to report in-kind contributions;
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters; and
5. Close the file.

Thomasenia P. Duncan
General Counsel

6/29/2009
Date

BY: Stephen Gura
Stephen Gura
Deputy Associate General Counsel
for Enforcement

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